

SERVED: June 11, 1993

NTSB Order No. EA-3893

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of May, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10968
v.)	
)	
RONALD C. CORLEY,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

This matter stems from an April 16, 1990 order in which the Administrator suspended respondent's mechanic certificate for 30 days for alleged violations of sections 43.13(a) and 121.701(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R.).¹ In that

¹FAR §§ 43.13(a) and 121.701(a) provide as follows:

"§ 43.13 Performance rules (general).

(a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices

order (which serves as the complaint), the following allegations were made:

1. At all times material herein, you were and are the holder of Mechanic Certificate No. 1896668, with Airframe and Powerplant ratings.
2. On or about June 30, 1989, at the Hartsfield International Airport, Atlanta, Georgia, you performed maintenance on civil aircraft N779UP, a Douglas DC-8 operated by United Parcel Service [(UPS)], by inspecting a fuel leak on the leading edge of the right wing of N779UP inboard of the number 4 engine.
3. You failed to perform your inspection using methods, techniques and practices prescribed by the manufacturer and acceptable to the FAA Administrator in that you failed to classify the fuel leak as required by section 51-1-12, pages 1-6 of the Douglas DC-8 Structural Repair Manual, using the methods described in that section.
4. You failed to enter the fuel leak into the maintenance log of N779UP.
5. A fuel leak is a malfunction critical to the safety of flight.

Respondent appealed that order, and a hearing before Administrative Law Judge Joyce Capps was subsequently scheduled

(..continued)
prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other techniques, and practices acceptable to the Administrator, except as noted in § 43.16. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.

§ 121.701 Maintenance log: Aircraft.

(a) Each person who takes action in the case of a reported or observed failure or malfunction of an airframe, engine, propeller, or appliance that is critical to the safety of flight shall make, or have made, a record of that action in the aircraft's maintenance log."

for September 20, 1990. On September 12, 1990, the Administrator moved for a continuance of the hearing, on the basis that one of his witnesses, Inspector Moon (who was a Reservist), had recently been called to active military duty and would, therefore, be unavailable to testify. The law judge denied the motion on that date and again when it was renewed at the hearing.² After the Administrator presented his case-in-chief, respondent moved for dismissal of the section 121.701(a) charge and that motion was granted.³ With respect to the remaining charge, the law judge issued an oral initial decision at the conclusion of the hearing, by which she reversed the Administrator's determination that respondent had violated FAR section 43.13(a).⁴ The Administrator has appealed from all three of the law judge's rulings.

In connection with his appeal, the Administrator contends that the continuance he sought should have been granted because Inspector Moon was both the FAA's principal on-scene safety inspector and its primary observer of the extent and severity of the fuel leak. In this vein, the Administrator points out that the law judge's ruling that no violation of section 43.13(a) occurred stemmed from a credibility determination favorable to respondent as to the size of the leak, and he asserts that the testimony of Inspector Moon would have corroborated that of a

²See Tr. 4-6.

³See id. 81-82.

⁴An excerpt from the transcript containing the law judge's initial decision is attached.

fellow safety inspector (Inspector Kelley) and may have resulted in a contrary credibility finding being made. The Administrator also notes that respondent did not oppose his request for a continuance.

With respect to the law judge's disposition of the substantive charges involved in this case, reversal is sought on several grounds. First, the Administrator contends that the law judge erred in ruling that respondent could not be held in violation of FAR section 121.701(a) on the basis that a fuel leak does not constitute a "failure or malfunction" within the intendment of that regulation. As to the law judge's determination that respondent did not violate section 43.13(a), the Administrator maintains that the evidence fails to support her finding that respondent took appropriate action in accordance therewith after the on-scene safety inspectors brought the fuel leak to his attention.⁵

The Board is not, however, persuaded by the Administrator's arguments and will, therefore, deny his appeal.

Beginning with the contentions advanced by the Administrator in connection with the denial of his motion for a continuance, we note that the disposition of such a motion is a matter left to the sound discretion of the law judge.⁶ In our opinion, such

⁵Respondent has submitted a reply brief, in which he urges the Board to affirm the initial decision in its entirety.

⁶See, e.g., Administrator v. Hawke, 1 NTSB 7, 9 (1967); Administrator v. Tuomela, 4 NTSB 1422, 1423, reconsideration denied, 4 NTSB 1428 (1984); Administrator v. Fisher, NTSB Order EA-2986 at 4 (1989), affirmed, 917 F.2d 27 (9th Cir. 1990).

discretion was not abused in this case. In the first place, the law judge recognized that there was a significant degree of uncertainty as to when Inspector Moon's active military duty would end and, therefore, when he would become available to testify.⁷ We have further observed that, although Inspector Moon was unable to appear at the hearing, testimony--including hearsay testimony as to statements made by Inspector Moon in connection with the incident--was furnished by Inspector Kelley, who had also been on the scene, observed the leak and participated in the questioning of respondent and his supervisor.⁸ In our view, the law judge did not act arbitrarily in denying the Administrator's motion for a continuance and, despite respondent's lack of formal opposition to the motion, there is no basis for reversing that ruling.

In connection with the dismissal of the section 121.701(a) charge, the Board disagrees with the law judge's view that a fuel

⁷Tr. 3-4. Inspector Moon had been called to active duty in the Persian Gulf, beginning on September 9, 1990. The record fails to reflect when he was first informed of his call-up and, thus, whether it was possible for him to have been deposed before that date. In September 1990, the length of American military involvement in the Persian Gulf was a matter of conjecture.

⁸At the hearing, Inspector Kelley testified that both he and Inspector Moon "agreed that [the leak] fit the category for some action to be taken." Tr. 28. From such testimony, the law judge could have inferred that Inspector Moon would have corroborated Inspector Kelley's assessment of the extent and severity of the leak. Indeed, the law judge previously recognized, in response to a comment made by counsel for the Administrator in support of his motion for a continuance, that Inspector Moon would have been a corroborating witness. Id. 6. We do not, therefore, believe that Inspector Moon's absence played a crucial role in the law judge's assessment of the evidence concerning the size of the leak.

leak does not constitute a failure or malfunction of an airframe, engine, propeller or appliance.⁹ Thus, we believe that her ruling was premature, and that it was necessary for her to have determined whether the fuel leak in question was critical to the safety of flight before she decided whether the Administrator's charge was sustainable. On this point, the Board notes that the law judge found, in connection with her disposition of the section 43.13(a) charge, that the leak at issue was no larger than four inches in diameter.¹⁰ We have further observed that the DC-8 Structural Repair Manual (Ex. A-2) does not call for either the grounding or repair of an aircraft having such a leak.¹¹ Moreover, while the Administrator raised the possibility that the fuel leak may have created a fire hazard or been indicative of a structural problem, we note that the FAA safety inspectors did not attempt to ground N779UP after they observed the leak, although they had the power to do so and were informed that respondent did not intend to take any action with respect thereto.¹² Consequently, we believe that the evidence fails to

⁹See Tr. 81-82 for the law judge's comments on this point.

¹⁰That factual finding was based on a credibility assessment, which the Board will not disturb on appeal.

¹¹According to the manual, leaks measuring up to four inches in diameter which are found in the section of the wing where the leak in question was located require only "frequent inspections" to insure that they do not progress. See Ex. A-2 at 4-5.

¹²Tr. 62-64, 122-25. We also note that respondent testified that fuel leaks of the size found on N779UP do not pose a fire hazard because they tend to evaporate when the aircraft becomes airborne (id. 128) and that such testimony was cited favorably by the law judge in her initial decision (id. 201).

demonstrate that the fuel leak in question was a matter critical to the safety of flight. For this reason, the Administrator's section 121.701(a) charge cannot be sustained.¹³

Turning to the section 43.13(a) charge, we note that the Administrator maintains that respondent did not take appropriate action under the DC-8 manual after the FAA safety inspectors brought the fuel leak to his attention. Specifically, the Administrator contends that respondent should have, but did not, either follow the manual's provisions for evaluating the leak or make a notation of the leak's existence in the aircraft log book so as to insure that the frequent inspections required by the manual would be performed.¹⁴

With respect to respondent's fulfillment of his duty to evaluate the leak, we observe that the manual provision cited by

¹³Thus, any error committed by the law judge in dismissing the § 121.701(a) charge was harmless.

¹⁴The Board notes that the law judge, in her initial decision, determined that respondent performed "maintenance" on N779UP, so as to come within the ambit of § 43.13(a), in that his act of looking at the fuel leak after the FAA safety inspectors pointed it out to him "constituted an inspection . . . and an inspection . . . constitute[s] maintenance." Tr. 196. As the applicability of § 43.13(a) has not been placed in issue in connection with this appeal, it will not be addressed in the body of this decision. Nevertheless, we believe that some clarification of this matter is called for in light of the law judge's analysis. Under the regulations (§ 1.1), the term "maintenance" is defined to include "inspection," but the term "inspection" is undefined. While the Board has previously found mechanics to have performed "maintenance" based on their conduct of 100 hour or annual inspections (see, e.g., Administrator v. Fisher, 4 NTSB 1382 (1984); Administrator v. Woods, 5 NTSB 1819, reconsideration denied 5 NTSB 1826 (1987)), it has yet to hold that action of the nature taken by respondent here constitutes an "inspection" and, hence, "maintenance" under § 43.13(a).

the Administrator states as follows:

Fuel leak evaluation should begin by washing the suspected area with solvent and wiping the area dry. . . . [This] will remove existing traces of fuel for further evaluation of the leak. . . . At the end of 15 minutes, each leak should be evaluated according to the size of the wetted area.¹⁵

Clearly, the above-cited procedure contemplates a situation where a leak is noted on initial observation of a wing. In contending that the wipedown and subsequent 15-minute evaluation called for in that procedure should have been performed after the safety inspectors pointed the leak out to respondent, the Administrator ignores the fact that he previously examined the wing at least two hours earlier and found it to be dry. Under such circumstances, we agree with the law judge that a wipedown and subsequent 15-minute evaluation of the leak would have been repetitious and was, therefore, unnecessary. Thus, the Board finds no merit in the Administrator's contention on this point.

We are also unpersuaded by the Administrator's assertion that respondent was required to make a logbook entry noting the existence of the leak in order to be deemed in compliance with section 43.13(a). In this regard, we note that while section 43.13(a) does not specifically impose a logbook entry requirement upon aircraft mechanics,¹⁶ the Administrator seeks to have such a

¹⁵Ex. A-2 at 1.

¹⁶The Board notes that logbook entry requirements are specifically imposed upon mechanics in FAR §§ 43.9 and 43.11, but that no violation of either of those regulations was alleged by the Administrator in this case.

requirement read into that regulation here by positing that it was necessary for respondent to have made a logbook entry in order for him to have insured the performance of the frequent inspections called for by the manual. However, as no logbook entry requirement was imposed by the manual, we find no support for the Administrator's position in the language of section 43.13(a).¹⁷

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's appeal is denied and the law judge's reversal of his order of suspension is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁷Moreover, we believe that the Administrator's concerns as to whether the frequent inspections mandated by the manual would in fact occur were met by UPS procedures, which provide for inspections of its aircraft, including a check for fuel on the wings, at least once a day, as well as more rigorous inspections each weekend and even more stringent "A checks" once every 35 days. Tr. 87-90, 109. Company procedures also require that a walkaround be performed by a crewmember, who is "responsible for looking for . . . discrepancies such as fuel leaks," prior to each flight. Id. 87. On June 30, 1989, N779UP underwent two daily inspections and several walkaround checks after leaving Hartsfield Airport. Id. 109-11; Ex. R-2. In addition, it was scheduled for an "A check" on July 1, 1989. Tr. 120; Ex R-6.